

1-1-2011

Secure in Their Yards - Curtilage, Technology, and the Aggravation of the Poverty Exception to the Fourth Amendment

Amelia L. Deidrich

Follow this and additional works at: https://repository.uchastings.edu/hastings_constitutional_law_quaterly



Part of the [Constitutional Law Commons](#)

Recommended Citation

Amelia L. Deidrich, *Secure in Their Yards - Curtilage, Technology, and the Aggravation of the Poverty Exception to the Fourth Amendment*, 39 HASTINGS CONST. L.Q. 297 (2011).

Available at: https://repository.uchastings.edu/hastings_constitutional_law_quaterly/vol39/iss1/5

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Constitutional Law Quarterly by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Secure in Their Yards? Curtilage, Technology, and the Aggravation of the Poverty Exception to the Fourth Amendment

by AMELIA L. DIEDRICH*

Fairness is what justice really is.
—Justice Potter Stewart

Introduction

The first clause of the Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”¹ Written to restrain the government from conducting excessive searches and seizures, the Fourth Amendment balances the interests of the people against the interests of the government.² The Supreme Court serves as the keeper of that Amendment, ensuring the privacy of the people by determining whether the government has committed “unreasonable searches and seizures.”

Today, the Court faces a challenge. It must adapt “a document originally adopted with the investigative tools of the eighteenth

* Juris Doctor Candidate 2012, University of California, Hastings College of the Law; B.A. *summa cum laude*, 2009, English, San Diego State University. I would like to thank Professor Hadar Aviram for her guidance throughout the drafting of this article. I would also like to thank my parents, Peter and Donna Diedrich, for their continual love, support, and encouragement of curiosity; my sisters, Molly and Hannah Diedrich, for keeping me grounded; and Ryan Lescure, for always being in my corner. Lastly, I would like to thank the *Hastings Constitutional Law Quarterly* editors for all of their hard work.

1. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

2. RONALD JAY ALLEN ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE* 335 (2d ed. 2005).

century in mind to the current state of the art,”³ which is no easy task. Adapting Fourth Amendment jurisprudence to changing technology has caused the Court to revisit the most basic tenets of the Fourth Amendment such as what constitutes a search, what the Amendment protects, and who the Amendment protects. For example, the Court has faced questions such as whether it is considered a search for an officer to use a beeper to track a can of chloroform in the back of a car?⁴ What if the tracker is attached to the car itself?⁵ While the Fourth Amendment states that “persons, houses, papers, and effects” are protected, does that list include the area immediately outside of the house known as curtilage?⁶ Does it include a car used as a house?⁷ These questions are further complicated by the social issues that permeate criminal law generally. Do the answers change when the subject of the search is poor versus wealthy? When the subject of the search is wealthy?

A recent trend in American jurisprudence of diminishing Fourth Amendment protections of curtilage suggests the answer to the last two questions is yes. As searches of curtilage using technology have increased, the traditionally heightened Fourth Amendment protections afforded curtilage have decreased.

This essay will explore technology’s impact on the Fourth Amendment protection of curtilage, and further, the detrimental effects this impact has on the poor. Section I traces the concept of curtilage through history, starting with British common law, where it was viewed as having the same sort of legal meaning and protection as the home itself. Section I also traces the rise of curtilage in American jurisprudence, where this equivalent treatment developed

3. Raymond Shih Ray Ku, *The Founders’ Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 MINN. L. REV. 1325 (2002).

4. *United States v. Knotts*, 460 U.S. 276, 285 (1983) (holding that a beeper to track a can of chloroform in the back of a car is not a search).

5. *United States v. Pineda-Moreno*, 591 F.3d 1212, 1215 (9th Cir. 2010) (holding that tracking a car through a GPS device attached to it without a warrant is not a search), *en banc reh’g denied*, 617 F.3d 1120 (9th Cir. 2010); *United States v. Maynard*, 615 F.3d 544, 555 (D.C. Cir. 2010) (holding that tracking a car through a GPS device attached to it without a warrant is a search).

6. *Dow Chemical Co. v. United States*, 476 U.S. 227, 231 (1986) (affirming that the Fourth Amendment protects curtilage).

7. *California v. Carney*, 471 U.S. 386, 393 (1985) (“While it is true that respondent’s vehicle possessed some, if not many of the attributes of a home, it is equally clear that the vehicle falls clearly within the scope of the [automobile] exception.”) (arguing that a mobile home does not receive the same Fourth Amendment protections as a home if it is more car than home).

into a heightened privacy expectation for curtilage matching that given to the home. Section II discusses the impact that searches using technology have had on the curtilage doctrine, contrasting traditional examples of courts giving curtilage the same Fourth Amendment protection as the home with cases where curtilage is severed from its legal equal. Section III explores the repercussions of this development, exploring The Poverty Exception to the Fourth Amendment and illustrating how diminished protection for curtilage aggravates that exception. Finally, section IV discusses proposed legal and social solutions to this aggravation in an attempt to make the Fourth Amendment a protector of privacy across class lines.

I. The Meaning of “Curtilage”

Like many other legal concepts, American jurisprudence borrowed the concept of curtilage from British common law. Today, the term “curtilage” refers to the legally protected area immediately surrounding the home.⁸ While the curtilage doctrine has undergone changes in both British common law and American jurisprudence, it has throughout history retained one important feature: Equivalence with the home.

A. The Development of Curtilage

1. British Common Law: Curtilage as a Specially Protected Place

“The British state, all eighteenth-century legislators agreed, existed to preserve the property and, incidentally, the lives and liberties, of the propertied.”⁹ Many facets of eighteenth century English law served this purpose. The Black Act of 1723, for example, made it a capital offense to trespass on the King’s property by wounding or stealing deer or poaching hares, rabbits, or fish in any of the King’s forests.¹⁰ The act also included a provision allowing a person to be deemed guilty and sentenced to death without trial if a credible witness swore to the Privy Council that the person had engaged in certain acts of property destruction.¹¹ These acts included

8. *Oliver v. United States*, 466 U.S. 170, 180 (1984).

9. E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT* 21 (1975).

10. *Id.* at 22.

11. *Id.*

“cutting down trees ‘planted in any avenue . . . or garden, orchard or plantation;’ [and] setting fire to any house, barn, haystack, etc.”¹²

This tendency towards sanctifying property was evident in another legal area: Curtilage. As a means of defense in England’s “early times,” it was customary for home owners to surround their home and related buildings¹³ with a “substantial wall.”¹⁴ The resulting area inside the wall and outside the home was known as the curtilage.¹⁵ Eventually, the risk of siege on English villages subsided, but the concept of curtilage and the protection it provided the structures inside it continued. After a time, that space between the home and the wall evolved from mere defense mechanism to something equivalent to the home itself. This was apparent in the practical consequences associated with curtilage as well as the way it was defined.

By the mid-eighteenth century, the practical significance of curtilage was well established.¹⁶ If a burglar stepped foot into someone’s curtilage, English common law treated the thief as if he had stepped into the main house itself.¹⁷ Curtilage was not some empty space, but a specially protected zone.¹⁸

Even today, curtilage has retained its status as being specially protected in British law. England’s Listed Buildings law, which grants special protections to structures of architectural or historic significance,¹⁹ recognizes the special connotations of curtilage. According to the law, any objects or buildings within the curtilage of a Listed Building are also eligible for Listed Building protections.²⁰

12. *Id.*

13. Related buildings would include, for example, barns or cottages.

14. *Bare v. Commonwealth*, 94 S.E. 168, 172 (Va. 1917).

15. *Wright v. State*, 77 S.E. 657, 658 (Ga. Ct. App. 1913).

16. 4 WILLIAM BLACKSTONE, COMMENTARIES *225 (“And if the barn, stable, or warehouse, be parcel of the mansion-house . . . though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all it’s branches and appurtenants, if within the curtilage or homestall.”).

17. *United States v. Dunn*, 480 U.S. 294, 300 (1987).

18. *See* BLACKSTONE, *supra* note 16.

19. *Planning (Listed Buildings and Conservation Areas) Act of 1990*, LEGISLATION.GOV.UK, <http://www.legislation.gov.uk/ukpga/1990/9/contents> (last visited Mar. 12, 2011) (Listed buildings “cannot be demolished, extended, or altered without permission from the local planning authority.”).

20. *Id.* (“In this Act, listed building means a building which is for the time being included in a list compiled or approved by the Secretary of State under this section . . . and . . . (b) any object or structure within the curtilage of the building.”).

Thus, curtilage has retained its connotation as a zone of protection under British law.

2. *American Curtilage: Legal Equivalent to the Home*

When curtilage was incorporated into American jurisprudence, it retained the special connection with the home that had been a defining characteristic at common law. As early as 1886, the United States Supreme Court utilized the common law definition of curtilage as “the area to which extends the intimate activity associated with the ‘sanctity of a man’s home.’”²¹

Generally, the legal significance of curtilage was so well established in early American jurisprudence that the Court often used the term without any definition or explanation. This was true of the first time the Supreme Court explicitly used the concept of curtilage.²² In *Amos v. United States*, law enforcement officers seized private property from Amos’s house and store pursuant to a warrantless search.²³ Amos petitioned the trial court for return of the items because they had been taken from “within his curtilage.”²⁴ Failing to explain, define or further discuss curtilage, the Court simply declared the seizure “clearly [of] unconstitutional character.”²⁵

Three years after this conclusory treatment, the Court offered a slightly more detailed—yet incredibly significant—discussion of Fourth Amendment protections afforded to curtilage.²⁶ In *Hester v. United States*, a man convicted of concealing illegal spirits challenged evidence gathered against him by revenue officers.²⁷ The officers, approaching Hester’s father’s land, witnessed an exchange of jugs between Hester and another man.²⁸ When the officers made themselves known, Hester and the other man threw their jugs to the ground and fled.²⁹ Officers were able to detect enough of the contents of the jugs to determine each had contained illegally distilled whisky.³⁰

21. *Boyd v. United States*, 116 U.S. 616, 630 (1886); See *Oliver*, 466 at 180 (quoting *Boyd*).

22. *Amos v. United States*, 255 U.S. 313 (1921).

23. *Id.* at 314.

24. *Id.*

25. *Id.* at 314, 316.

26. *Hester v. United States*, 265 U.S. 57 (1924).

27. *Id.* at 57.

28. *Id.*

29. *Id.*

30. *Id.*

Hester claimed that since the officers had no warrant, their search and seizure of the discarded jugs was a violation of his Fourth Amendment rights.³¹ The Court summarily dismissed these challenges, stating that Hester himself made the jugs known to the officers by throwing them to the ground, that the officer's examination did not constitute a seizure under the Fourth Amendment,³² and that "the only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land."³³ However, the Court determined the jugs were too far away from the father's house to be protected within the curtilage. "[T]he special protection accorded by the Fourth Amendment . . . is not extended to the open fields,"³⁴ as "[t]he distinction between [open fields] and the house is as old as the common law."³⁵

While the Court's discussion of curtilage in *Hester* is implicit, it is significant. The Court states that the only "shadow" of a claim Hester has is that the search may have taken place on his father's land, suggesting that such land (or curtilage) would receive some level of Fourth Amendment protection. The Court then states that no Fourth Amendment protection is given to open fields, dismissing the idea that the jugs were within the curtilage of Hester's father's land, and recounts the "old" difference between "open fields" and "the home." While at first the Court uses the phrase "father's land" to describe this suggested protected space, it switches to the word "home" in the conclusion of its opinion. This substitution of "father's land" for "home" suggests the Court viewed the two as interchangeable and equal.

This implicit aligning of the home with the land around the home, the curtilage, suggests that the Court viewed curtilage as receiving the same Fourth Amendment protections as the home. In fact, in later cases the Court has described Justice Holmes' majority opinion in *Hester* as having "distinguished 'open fields' from the 'curtilage' The distinction implies that only the curtilage, not the

31. *Id.* at 57–58.

32. *Id.*

33. *Id.* at 59.

34. *Id.* See also *Oliver v. United States*, 466 U.S. 170, 173 (1984) ("The 'open fields' doctrine . . . permits police officers to enter and search a field without a warrant.").

35. *Hester*, 265 U.S. at 59.

neighboring open fields, warrants the Fourth Amendment protections that attach to the home.”³⁶

3. *The Modern Curtilage Doctrine*

While the equivalence between the home and curtilage easily carried over from British common law to American jurisprudence, the determination of where curtilage began and ended proved more difficult for the Court. Unlike Medieval England, where the wall surrounding individual properties served as a convenient and tangible demarcation of the termination of curtilage, areas around American homes generally have no easily identified boundary.³⁷ Differing styles of homes along with differing geographical settings begged the question: What constitutes curtilage for American homes?

It was precisely in this context of confusion that the Supreme Court, in *Oliver v. United States*, attempted to “clarify confusion” concerning the open fields doctrine.³⁸ The Court reaffirmed *Hester*, holding that “an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home.”³⁹ Recalling the “overriding respect for the sanctity of the home” that has characterized Fourth Amendment jurisprudence, the Court stated that curtilage “has been considered part of the home itself for Fourth Amendment purposes.”⁴⁰ Thus the Court made explicit the previously implicit idea that curtilage receives the same Fourth Amendment protections afforded the home.

B. *The Heightened Privacy Expectation of Curtilage*

The idea that curtilage is afforded the same Fourth Amendment protections as the home is of special significance, given the heightened protections afforded to the home. The home has been described by the Supreme Court as a sacred site “at the core of the

36. *Oliver*, 466 U.S. 170 at 180.

37. *Wright v. State*, 77 S.E. 657, 658 (Ga. Ct. App. 1913) (“It has been several times said by learned jurists that it was unfortunate that this term ‘curtilage,’ found in the English statutes defining the offense of burglary, and which applies to the dwelling and the houses surrounding the dwelling-house in England, should have been perpetuated in the statutes of our different states; for the term is not strictly applicable to the common disposition of inclosures and buildings constituting the homestead of the inhabitants of this country.”).

38. In what has since been called the “Modern Curtilage Doctrine.”

39. *Oliver*, 466 U.S. 170 at 178.

40. *Id.* at 178–180.

Fourth Amendment”⁴¹ The Court has also stated that physical entry of the home is the “chief evil against which the wording of the Fourth Amendment is directed.”⁴² One scholar even proclaimed, “the ideal of the inviolate home dominates the Fourth Amendment.”⁴³

It is not rhetoric alone that puts the home on a Fourth Amendment pedestal; the law does as well. Courts consistently make reference to the fact that the home is where “privacy expectations are most heightened.”⁴⁴ This idea is also evident in substantive law. Some laws involve an implicit acknowledgment of the sanctity of the home and the privacy protections it receives. For example, arrests made in public do not require a warrant.⁴⁵ However, arrests made in the home do.⁴⁶

Other legal concepts are more explicit. For example, the Court has established two explicit presumptions concerning the heightened privacy protections afforded the home. The first is that intrusions into the home are presumed to be searches under the Fourth Amendment. Generally, a law enforcement officer’s intrusion is considered a search if the suspect exhibited a subjective expectation of privacy, and if society is prepared to recognize that expectation as objectively reasonable.⁴⁷ Once an intrusion is deemed a search, the Court determines whether the search was reasonable.⁴⁸ If so, it is constitutional.⁴⁹ If not, and no exceptions apply, it is unconstitutional.⁵⁰ “At the very core [of the Fourth Amendment],” the Court has said, “stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”⁵¹ The fact that the Court uses the term “unreasonable” shows that it conceptually passed over the determination of whether the intrusion is a search, and presumes that it is.

41. *Wilson v. Layne*, 526 U.S. 603, 612 (1999).

42. *United States v. U.S. Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297, 313 (1972).

43. Stephanie M. Stern, *The Inviolable Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905 (2010).

44. *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (quoting *Dow Chem. Co. v. United States*, 476 U.S. 227, 237 n.4 (1986)).

45. *United States v. Watson*, 423 U.S. 411, 417 (1976).

46. *Payton v. New York*, 445 U.S. 573, 576 (1980).

47. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

48. ALLEN ET AL., *supra* note 2, at 356.

49. *Id.*

50. *Id.*

51. *Silverman v. United States*, 365 U.S. 505, 511 (1961).

The second presumption the Court has made involves this reasonableness determination. To recapitulate, the determination that an intrusion is a search is followed by a determination of the reasonableness of the search. A finding that the search was unreasonable means the search was unconstitutional. “With few exceptions,” the Court has said, “the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.”⁵² Thus, warrantless searches of the home are presumptively invalid.

These same presumptions of heightened privacy apply to curtilage. Mirroring the language used to describe the Fourth Amendment protections afforded the home, the Court has stated that “[the] area immediately adjacent to a private home” is where privacy expectations are “most heightened.”⁵³ Since the Court has previously used the language “heightened privacy expectations” to describe the home, utilizing that same language to describe the Fourth Amendment protections for curtilage further aligns curtilage with the home. Indeed, “[i]t is now well established that individuals have a reasonable expectation of privacy . . . not only in their homes, but also in the curtilage surrounding their dwelling.”⁵⁴ By stating that individuals have a “reasonable expectation” of privacy to their curtilage, the Court established the presumption that intrusions into the curtilage are searches—just as the Court has established in regard to the home.

Lower federal courts have made the second of these heightened privacy presumptions between the home and curtilage explicit, ruling that “the home and its traditional curtilage [are] given the highest protection against warrantless searches and seizures.”⁵⁵ This language evokes the presumption against “warrantless searches” the Court has established in favor of the home, affirming that the presumption extends to curtilage. Thus, courts have continued the legal tradition begun in British common law of equating curtilage with the home.

Using language indicating the home and curtilage share Fourth Amendment protections, the Court and lower courts have established two presumptions of heightened privacy protections that apply

52. *Kyllo v. United States*, 533 U.S. 27, 31 (2001).

53. *Dow Chem. Co. v. United States*, 476 U.S. 227, 237 n.4 (1986).

54. Carrie Leonetti, *Open Fields in the Inner City: Application of the Curtilage Doctrine to Urban and Suburban Areas*, 15 GEO. MASON U. CIV. RTS. L.J. 297, 301 (2005).

55. *United States v. Warner*, 843 F.2d 401, 405 (9th Cir. 1988).

equally to homes and curtilage: 1) intrusions are presumptively considered searches, and 2) warrantless searches are unreasonable.

II. Technology and its Diminishing Effect on the Heightened Protections of Curtilage

Recent jurisprudence suggests that the tradition of curtilage sharing the same heightened Fourth Amendment protections as the home may be coming to a halt. In recent years, the Court has developed a tendency to distinguish curtilage from the home when technological advancements are used in the intrusion of curtilage.

Technically, any device used in a search could be called a “technological advancement.” However, here the term is meant to refer to those things to which an average person does not have ready access. This includes devices such as airplanes, helicopters, thermal vision cameras, and Global Positioning System (“GPS”) tracking devices (not to be confused with GPS navigation systems). As will be discussed, in cases involving the use of such technological advancement in a search, the Court ignores the long-standing heightened Fourth Amendment protection it has granted curtilage.

A. Traditional Use of the Curtilage Doctrine

Under the traditional view of curtilage, a warrantless search of curtilage is presumptively invalid. In *United States v. Reilly*,⁵⁶ the United States appealed a trial court’s decision to suppress evidence of marijuana found growing in and around a cottage situated about 375 feet from Reilly’s main home.⁵⁷ The Second Circuit Court of Appeals agreed with the district court’s finding that the cottage was within the curtilage of the main home, and as such the officers’ warrantless intrusion was a violation of Reilly’s Fourth Amendment rights.⁵⁸ While discussing the curtilage issue, the Second Circuit noted that curtilage is specially protected under the Fourth Amendment because people have a “reasonable expectation of privacy” to those areas adjacent to their homes that “harbors the intimate activity associated with the sanctity of a man’s home and the privacies of life.”⁵⁹

56. *United States v. Reilly*, 76 F.3d 1271 (2nd Cir. 1996).

57. *Id.* at 1274–75.

58. *Id.* at 1272.

59. *Id.* at 1275.

Similarly, in *Daughenbaugh v. City of Tiffin*,⁶⁰ Robert Daughenbaugh challenged the warrantless search of a detached garage behind his house as having violated his Fourth Amendment rights.⁶¹ Daughenbaugh claimed that by entering the backyard of his home and searching his garage, police illegally entered the curtilage of his home.⁶² Immediately after concluding that the garage was in the curtilage of his house, the court stated “[t]he officers consequently violated Daughenbaugh’s constitutional rights by conducting a warrantless search of the garage.”⁶³

B. Technology and Curtilage

In both *Reilly* and *Daughenbaugh*, police searched curtilage simply by walking onto the property and observing the surroundings. Increasingly, however, law enforcement agents rely on technological advancements to enhance their searches. As discussed below, an officer’s use of technological advancements alters the legal analysis of the search. When the search of curtilage involves a technological advancement, the Court is less likely to adhere to the traditional treatment of curtilage as receiving the same heightened Fourth Amendment protections as the home.

1. The Diminishing Effect of Searches Using Technological Advancements on Heightened Fourth Amendment Protections of Curtilage

As police use of technology in searches increases, the Court faces the challenge of determining how that use effects Fourth Amendment protections. Indeed, as the Court noted, “[p]olice do not always inspect open fields . . . [or] curtilage . . . by walking across them. Sometimes they fly.”⁶⁴ In *California v. Ciraolo*, police officers received an anonymous tip that Ciraolo was growing marijuana in his backyard.⁶⁵ Unable to see into Ciraolo’s backyard from ground level due to a six-foot tall outer fence and a ten-foot tall inner fence, officers secured a private plane and flew over the yard at an altitude of one thousand feet.⁶⁶ Through this technologically enhanced search,

60. *Daughenbaugh v. City of Tiffin*, 150 F.3d 594 (6th Cir. 1998).

61. *Id.* at 595–96.

62. *Id.*

63. *Id.* at 601.

64. ALLEN, *supra* note 2, at 360.

65. *California v. Ciraolo*, 476 U.S. 207, 209 (1986).

66. *Id.*

officers were able to see marijuana plants growing in Ciraolo's yard.⁶⁷ The California Court of Appeal declared the warrantless flyover an impermissible intrusion into the curtilage of Ciraolo's home, and as such deemed it a violation of his Fourth Amendment protections against unreasonable search.⁶⁸ The California court applied the same presumption against warrantless searches of curtilage that historically governed searches of curtilage—the same presumption the *Reilly* and *Daughenbaugh* courts used.

The Supreme Court, however, disagreed.⁶⁹ Before analyzing the constitutionality of the search, the Court first accepted that the yard and its contents were within the curtilage of Ciraolo's home.⁷⁰ Normally this would lead the Court to proclaim the presumptive invalidity of the warrantless search, as the California court did. However, despite accepting that the search was of curtilage, the Court determined that the search was not a violation of Ciraolo's Fourth Amendment rights. After reemphasizing the heightened Fourth Amendment protections afforded curtilage⁷¹ the Court stated that since "any member of the public flying in this airspace who glanced down could have seen" the plants, Ciraolo "knowingly exposed" his illegal activity to the public.⁷² As such, Ciraolo's expectation of privacy to the curtilage of his home was "unreasonable" and "not an expectation that society is prepared to honor."⁷³ Therefore, the Court held that the intrusion was not a search.⁷⁴

This deviation from the traditional curtilage doctrine was not an isolated decision. Just three years later, the Court revisited this rationale in *Florida v. Riley*.⁷⁵ The facts and procedural history of *Riley* are strikingly similar to those of *Ciraolo*. In *Riley*, police received an anonymous tip that Riley was growing marijuana in a greenhouse in his backyard.⁷⁶ When police realized they were unable

67. *Id.*

68. *Id.* at 210.

69. *Id.* at 213–14.

70. *Id.* at 213.

71. *Id.* "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *Id.* at 212–13.

72. *Id.* at 210, 213–14.

73. *Id.* at 214.

74. *Id.*

75. *Florida v. Riley*, 488 U.S. 445 (1989).

76. *Id.* at 448.

to see into the greenhouse due to its opaque sides, an officer flew over Riley's backyard in a helicopter at an altitude of about 400 feet.⁷⁷ From this perspective, the officer could see through the transparent roof of the greenhouse and observe the marijuana plants inside.⁷⁸ The Florida Supreme Court agreed with the trial court's determination that the search of Riley's curtilage was a violation of the Fourth Amendment.⁷⁹ As in *Ciraolo*, the state court utilized the traditional presumption afforded curtilage that warrantless searches of curtilage are constitutionally impermissible.

Again, the Supreme Court disagreed. As in *Ciraolo*, the Court agreed that the area intruded upon was within the curtilage of Riley's home.⁸⁰ Despite that finding, the Court proceeded to use a similar rationale as that used in *Ciraolo* to find the search of Riley's curtilage was not a Fourth Amendment violation. Noting that the Federal Aviation Administration ("FAA") regulations permit helicopters to fly at an altitude of four hundred feet, the Court stated that "[a]s a general proposition, the police may see what may be seen 'from a public vantage point where [they have] a right to be.'"⁸¹ Since FAA regulations allowed police to be four hundred feet above Riley's backyard, the Court held that there was no unconstitutional search.⁸² Other members of the Court were not as comfortable relying on FAA regulations to determine the reasonableness of Riley's expectation of privacy. Justice O'Connor noted in her dissent that "the plurality's approach rests the scope of Fourth Amendment protection too heavily on compliance with FAA regulations whose purpose is to promote air safety, not to protect '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'"⁸³

The most recent deviation from the traditional presumptions associated with curtilage comes from the Ninth Circuit Court of Appeals. In *United States v. Pineda-Moreno*, agents from the Drug Enforcement Agency ("DEA") installed a GPS tracking device onto

77. *Id.*

78. *Id.*

79. *Id.* at 449.

80. *Id.* at 450.

81. *Id.* at 449–50. 400 feet is within the FAA permitted altitudes of helicopters. *Id.* The Court notes "[w]e would have a different case if flying at that altitude had been contrary to law or regulation." *Id.* at 451.

82. *Id.* at 449.

83. *Id.* at 452 (O'Connor, J., concurring).

the underside of Juan Pineda-Moreno's Jeep without a warrant on seven separate occasions.⁸⁴ On one of these occasions, the GPS device was affixed to the car while it was parked in Pineda-Moreno's driveway.⁸⁵ Later, agents received information from the device that Pineda-Moreno's Jeep had just left a suspected marijuana growing site.⁸⁶ Agents intercepted the car, and pulled Pineda-Moreno over.⁸⁷ A subsequent search of the car and Pineda-Moreno's home resulted in the discovery of a large quantity of marijuana.⁸⁸ At trial, Pineda-Moreno moved to suppress the evidence from the GPS device claiming its attachment was a violation of his Fourth Amendment right to be free from unreasonable searches.⁸⁹ When the trial court denied his motion, he appealed to the Ninth Circuit Court of Appeals.⁹⁰

The Ninth Circuit began its opinion with a statement of the issue: "We must decide whether law enforcement officers violate a suspect's Fourth Amendment rights when they enter the curtilage of his home and attach a mobile tracking device to the undercarriage of his car."⁹¹ The court thus assumed that Pineda-Moreno's Jeep was within the curtilage of his home when DEA agents placed the technological device to its underside. The longstanding presumption against the constitutionality of warrantless searches of curtilage would suggest a denouncement of the invasion of Pineda-Moreno's curtilage as a violation of his Fourth Amendment rights.

However, the Ninth Circuit followed in the Supreme Court's most recent footsteps in stating that the mere fact that the car was within the curtilage is not enough: "In order to establish a reasonable expectation of privacy . . . [Pineda-Moreno] must support that expectation by detailing the special features of the driveway itself (i.e. enclosures, barriers, lack of visibility from the street)"⁹² The Ninth Circuit made no mention of the presumption that "individuals have a reasonable expectation of privacy . . . in the curtilage

84. *United States v. Pineda-Moreno* 591 F.3d 1212, 1213 (9th Cir.), *reh'g denied en banc*, 617 F.3d 1120 (9th Cir. 2010).

85. *Id.*

86. *Id.* at 1214.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1213.

92. *Id.* at 1215 (quoting *Maisano v. Welcher*, 940 F.2d 499, 503 (9th Cir. 1991)).

surrounding their dwelling.”⁹³ Since Pineda-Moreno could not provide such support, the Ninth Circuit stated, the curtilage of his home was not protected by the Fourth Amendment:

If a neighborhood child had walked up Pineda-Moreno’s driveway and crawled under his Jeep to retrieve a lost ball or runaway cat, Pineda-Moreno would have no grounds to complain. Thus, because Pineda-Moreno did not take steps to exclude passersby from his driveway, he cannot claim a reasonable expectation of privacy in it, regardless of whether a portion of it was located within the curtilage of his home.⁹⁴

As with the Supreme Court before it in *Ciraolo* and *Riley*, the Ninth Circuit failed to apply the long-standing presumption granting curtilage the same heightened Fourth Amendment protections as the home.

2. *The Inviolable Home Remains: Fourth Amendment Protection in Technologically Enhanced Searches of the Home.*

This diminished Fourth Amendment protection against unreasonable searches does not apply to all searches utilizing technology. Rather, it applies only to curtilage. In *Kyllo v. United States*, a federal agent suspected Danny Kyllo was growing marijuana in his Oregon home.⁹⁵ The agent used a thermal imaging device to detect exorbitant amounts of heat, indicative of high intensity lights used for home marijuana cultivation, coming from the home.⁹⁶ The imager’s readings showed such heat was emanating from Kyllo’s home.⁹⁷ Using this and other information, the agent procured a warrant to search the home.⁹⁸ More than one hundred marijuana plants were found in the search, and Kyllo eventually entered a

93. Leonetti, *supra* note 54, at 301.

94. *Pineda-Moreno*, 591 F.3d 1212 at 1215. Despite the fact that *Pineda-Moreno* hinged on Fourth Amendment issues concerning a car, the Ninth Circuit invoked none of the precedent concerning cars and the Fourth Amendment. The Supreme Court has made it very clear that cars receive diminished Fourth Amendment protections. *E.g.*, *California v. Carney*, 471 U.S. 386 (1985); *Carroll v. United States*, 267 U.S. 132 (1925). However, the Ninth Circuit stayed focused on the location of the car when the devices were affixed to it, rather than the nature of the car itself for Fourth Amendment purposes.

95. *Kyllo v. United States*, 533 U.S. 27, 29 (2001).

96. *Id.* at 29–30.

97. *Id.* at 30.

98. *Id.*

conditional guilty plea to one count of manufacturing marijuana.⁹⁹ Kyllo appealed his conviction, challenging the agent's use of the thermal imager as an unreasonable search in violation of the Fourth Amendment.¹⁰⁰ This time, the Court agreed. The Court first characterized the agent's use of the thermal imager as a search of Kyllo's home.¹⁰¹ Acknowledging the long standing presumption against warrantless searches of the home in general, the Court stated "[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."¹⁰² Absent special circumstances, the Court continued, a search using such technology would be found unconstitutional.¹⁰³ Since there were no special circumstances apparent, the agent's use of the thermal imager was an unlawful search.¹⁰⁴

Ciraolo,¹⁰⁵ *Riley*,¹⁰⁶ *Pineda-Moreno*,¹⁰⁷ and *Kyllo*¹⁰⁸ share remarkable similarities. All involved warrantless searches that resulted in the discovery of drugs. All involved warrantless searches that were enhanced by technological advancements. All involved warrantless searches of areas traditionally granted heightened Fourth Amendment protection. Yet, despite all of these similarities, the Court only found an unconstitutional search to have occurred in *Kyllo*. The only explanation for these different outcomes lies in the specific area under surveillance: *Kyllo* involved a search of a home rather than a search of curtilage.

The *Kyllo* Court's rhetoric concerning the special status of the home highlights the discrepancy in its treatment of the home and the curtilage. If "[t]he Fourth Amendment 'draws 'a firm line at the

99. *Id.*

100. *Id.*

101. *Id.* at 31. In contrast, the dissent argues the use of the thermal imager was not a search of the home at all, but a search of the exterior ("[T]he case before us merely involves indirect deductions from 'off-the-wall' surveillance," rather than "through-the-wall surveillance."). *Id.* at 41 (Stevens, J., dissenting).

102. *Id.* at 40.

103. *Id.* at 31.

104. *Id.* at 40.

105. *California v. Ciraolo*, 476 U.S. 207 (1986).

106. *Florida v. Riley*, 488 U.S. 445 (1989).

107. *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010).

108. *Kyllo*, 533 U.S. 27.

entrance to the house,”¹⁰⁹ it should also draw a firm line at the curtilage. But as *Ciraolo*, *Riley*, and *Pineda-Moreno* demonstrate, if the search involves technological enhancements, such a line is not drawn. Despite the tradition of curtilage and the home as legal equivalents, the Court separates them here. The trend of diminished Fourth Amendment protections against unreasonable search is confined to searches of curtilage, separating curtilage from its legal equal.

III. Repercussions of Diminished Protections for Curtilage

Distinguishing curtilage from the home and refusing to apply heightened Fourth Amendment protections poses significant repercussions, especially for the poor. While the criminal justice system has always to some extent treated the rich differently than the poor, diminished curtilage protections aggravate that difference.

A. The Poverty Exception to the Fourth Amendment

Calling the criminal justice system anti-egalitarian is nothing new.¹¹⁰ Despite the neutral language of the Fourth Amendment, allegations that it is applied discriminatorily against poor individuals have been made for decades. In exploring the discriminatory aspects of the Fourth Amendment, Christopher Slobogin referred to economic-based disparity in Fourth Amendment protection as “The Poverty Exception.”¹¹¹

This “Poverty Exception,” according to Slobogin, is evident in both the Supreme Court’s framework for analyzing Fourth Amendment privacy issues and the ultimate holdings of its cases. Slobogin first claims that the very framework used for Fourth Amendment analysis, whether a reasonable expectation to privacy existed, is inherently classist. “[T]he Court has signaled that the reasonableness of privacy expectations in [the home and surrounding areas] is contingent upon the existence of ‘effective’ barriers to intrusion [such as fences, security systems, enclosed garages, and other things that wealthier individuals have better access to]. In other words, one’s constitutional privacy is limited by one’s actual

109. *Id.* at 40 (citing *Payton v. New York*, 445 U.S. 573, 590 (1980)).

110. William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1265 (1999) (“[T]he central problem of late-twentieth-century American criminal justice: it [is] biased . . . against the poor.”).

111. Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391 (2003).

privacy.”¹¹² Since poorer individuals cannot afford to erect these “barriers to intrusion,” they are subject to less Fourth Amendment protection than those who can.

Turning to the Court’s decisions, Slobogin focuses on the holding of *Wyman v. James*.¹¹³ In *Wyman*, the Court held welfare agents could conduct “warrantless, suspicionless inspections of [welfare] benefit recipient’s’ homes” to detect welfare fraud.¹¹⁴ While this holding alone seems antithetical to the Fourth Amendment, its unreasonableness is highlighted when contrasted with the holding of *G.M. Leasing Corp. v. United States*.¹¹⁵ There, the Court held that a warrant was required for the IRS to search a business that was being investigated for tax fraud.¹¹⁶ These two irreconcilable rulings, Slobogin suggests, are evidence of an (at best) implicit bias against indigent subjects of Fourth Amendment searches.¹¹⁷ Other scholars agree *Wyman* is a prime example of the Court “exempt[ing] the poor from the full measure of privacy protections at the core of our constitutional identity.”¹¹⁸ One scholar claims this discriminatory treatment has rendered the poor a “subconstitutional class.”¹¹⁹

The Court’s decisions in other areas also highlight discriminatory treatment of the poor. In *United States v. Dunn*, the Court described the boundaries of curtilage in ways primarily applicable to suburban properties: (1) the proximity of the area to the home, (2) whether the area was within an enclosure surrounding the home, (3) the nature of the uses to which the area was put, and (4) the steps taken to protect the area from observation by passersby.¹²⁰ These elements make “the most sense in the least urban settings.”¹²¹ However, many poor individuals live in urban, multi-occupant buildings rather than

112. *Id.* at 401.

113. *Wyman v. James*, 400 U.S. 309 (1971).

114. Slobogin, *supra* note 111, at 402.

115. *G. M. Leasing Corp. v. United States*, 429 U.S. 338 (1977).

116. Slobogin, *supra* note 111, at 403.

117. *Id.*

118. Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolable Home*, 85 IND. L.J. 355, 356 (2010). See also Robin Morris Collin & Robert William Collin, *Are the Poor Entitled to Privacy*, 8 HARV. BLACK LETTER L.J. 181, 194 (1991); Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 699–700 (2009); 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §10.3(a) (4th ed. 2004).

119. Budd, *supra* note 118, at 357.

120. *United States v. Dunn*, 480 U.S. 294, 300–01 (1987).

121. Leonetti, *supra* note 54, at 303.

sprawling properties with fences and barns. Rather than try and equate the outside space of an apartment building or motel with suburban curtilage, the Court has found that the privacy protections of residents of multi-occupant buildings stop at the front door.¹²² Simply because of their living arrangement, poor individuals have little to no space designated as curtilage. As Judge Posner wrote, “it is simple realism that people who live in rural areas or have wealth will have more physical privacy than people who live in cities . . . and that therefore they will derive more protection from the Fourth Amendment.”¹²³

The Supreme Court’s framework for Fourth Amendment analysis and constitutional rulings are not the only places where The Poverty Exception is apparent. Such disparity can be found before courts ever get involved. The searches and seizures that invoke Fourth Amendment protections require a government actor to search or seize.¹²⁴ Practically and most commonly, this government actor is a police officer. Police conduct, then, is integral to how Fourth Amendment protections are applied on a day-to-day basis. Scholars have noted the phenomenon of police overenforcement in poorer neighborhoods.¹²⁵ Overenforcement is when “the police are highly vigorous in their enforcement of . . . crime.”¹²⁶ While this may seem a phenomenon with no downside, such overenforcement frequently includes “overly aggressive stop and frisk activities, dual arrest patterns (that is, arrest both the suspect and victim for violence) and

122. See *Stoner v. California*, 376 U.S. 483 (1964) (analogizing the warrantless search of a hotel room to the search of a home without any mention of the curtilage doctrine); *Miller v. United States*, 357 U.S. 301, 314 (1958) (neglecting to discuss the curtilage doctrine when evaluating whether defendant’s arrest was constitutional where police knocked on defendant’s apartment door, defendant opened and then attempted to close the door before police entered).

123. *United States v. Redmon*, 138 F.3d 1109, 1132 (7th Cir. 1998) (Posner, J., dissenting).

124. *Katz v. United States*, 389 U.S. 347, 349 (1967).

125. Robert J. Kane, *Compromised Police Legitimacy as a Predictor of Violent Crime in Structurally Disadvantaged Communities*, 43 *CRIMINOLOGY* 469 (2005); Rob White, *Racism, Policing, and Ethnic Youth Gangs*, 7 *CURRENT ISSUES CRIM. JUST.* 302, 312 (1996). See also Elora Mukherjee, *Criminalizing the Classroom: The Over-Policing of New York Schools*, N.Y. CIV. LIBERTIES UNION AND AM. CIV. LIBERTIES UNION 4 (2007); David Cole, *Race, Policing, and the Future of Criminal Law*, AMERICAN BAR ASSOCIATION SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES, http://www.americanbar.org/publications/human_rights_magazine_home/irr_hr_summer99_cole.html (last visited March 1, 2011).

126. Kane, *supra* note 125, at 484.

other aggressive activities.”¹²⁷ Thus those subject to overenforcement are also subject to an increase in police harassment, often in the form of warrantless searches of their person, compared to those who do not experience such overenforcement.

Who is subject to overenforcement is significantly tied to the economic vitality of the neighborhood being policed. One study found that 82.1% of extremely disadvantaged precincts in New York were subject to over policing, compared to only 16.2% of low disadvantage precincts.¹²⁸ As another scholar put it, “[t]he poor and dispossessed are characteristically over-policed in a class-divided society.”¹²⁹

Other, although markedly fewer, scholars have noted underenforcement as another manifestation of classism in the criminal justice system.¹³⁰ Underenforcement involves a “weak state response to lawbreaking as well as to victimization.”¹³¹ This phenomenon “deprives residents of personal and economic security, rendering calls to the police futile or even dangerous.” Since underenforcement involves a lack of police involvement by definition, few Fourth Amendment issues arise under it. However the issues that do arise, mainly disparate treatment of poor individuals in the criminal justice system, are no less important.

Thus, overenforcement, Supreme Court case law and the Supreme Court’s framework for analyzing Fourth Amendment issues

127. *Id.*

128. *Id.* at 482. Kane used several factors to differentiate extremely disadvantaged precincts from highly disadvantaged and low disadvantage, all of which are indicia of poor neighborhoods: Percentage of black precinct members, foreign born precinct members, female headed households with children, households with public assistance income, low education, poverty, residential stability, and adult unemployment rate. *Id.* at 479.

Kane found extremely disadvantaged precincts to consist of a mean of 52.16% black precinct members, 16.08% foreign born precinct members, 52.06% female-headed households with children, 31.71% of households with public assistance income, 21.2% of members with low education, 37.95% living in poverty, 60.96% of residential stability, and a mean adult unemployment rate of 14.04%. *Id.* These figures are compared to those of low disadvantage precincts: 14.11% black precinct members, 27.78% foreign born precinct members, 17.18% female headed households with children, 6.95% of households with public assistance income, 10.15% low education, 10.72% living in poverty, 61.66% residential stability, and a mean adult unemployment rate of 5.88%. *Id.*

129. White, *supra* note 125, at 312.

130. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 19 (1997); Alexandra Natapoff, *Underenforcement* 75 FORDHAM L. REV. 1715 (2006); William J. Stuntz, *Accountable Policing* 3–4 (Harvard Law School, Harvard Pub. Law Working Paper No. 130, 2006).

131. Natapoff, *supra* note 130, at 1717–18.

exemplify the disparate treatment the poor receive when it comes to Fourth Amendment protections. Residents of poor neighborhoods are more frequently subject to searches of their person in the form of overly aggressive stop and frisk tactics.¹³² Additionally, recipients of welfare are more likely to have an unannounced government agency search of their home as compared to a business being investigated by the IRS.¹³³ Lastly, the framework used by the Court to determine the extent of Fourth Amendment protections against unreasonable search and seizure hinges upon an individual's actual privacy.¹³⁴ While these scenarios touch on different aspects of life and law, they do share a common thread: poor individuals receive less Fourth Amendment protections than their wealthier counterparts.

B. Diminished Curtilage Protection as an Aggravation of the Poverty Exception

This Poverty Exception to the Fourth Amendment is aggravated by the Supreme Court's trend of disregarding the heightened Fourth Amendment protection afforded curtilage in instances of searches utilizing technological advancements. Because of this trend, poor individuals will continue to experience less Fourth Amendment protection than their wealthier counterparts.

In his dissent to the Ninth Circuit's denial of Pineda-Moreno's request for an en banc rehearing, Judge Kozinski discussed the effects the decision would have on the poor.¹³⁵ Disturbed by the majority's "dismantl[ing of] the zone of privacy we enjoy in the home's curtilage," Kozinski recounts that the majority "assumes that Pineda-Moreno's driveway was part of his home's curtilage, yet concludes that Pineda-Moreno had no reasonable expectation of privacy there."¹³⁶ By disregarding the presumption that individuals have a reasonable expectation of privacy to their curtilage and instead requiring Pineda-Moreno to establish that expectation by showing

132. Kane, *supra* note 125.

133. Wyman v. James, 400 U.S. 309 (1971); G. M. Leasing Corp. v. United States, 429 U.S. 338 (1977).

134. Slobogin, *supra* note 111.

135. United States v. Pineda-Moreno, 617 F.3d 1120 (9th Cir. 2010) (rehearing denied en banc) (Kozinski, J., dissenting) (petitioning the Ninth Circuit to rehear his case after the D.C. Circuit decided that warrantless attachment of a GPS tracking device to the underside of a suspect's car did constitute an unreasonable search in United States v. Maynard, 615 F.3d 544, 568 (D.C. Cir. 2010)).

136. Pineda-Moreno, 617 F.3d 1120 at 1121 (rehearing denied en banc) (Kozinski, J., dissenting).

“special features of the driveway itself (i.e., enclosures, barriers, lack of visibility from the street),”¹³⁷ the majority ensured class discrepancy in Fourth Amendment protection.¹³⁸

The very rich will still be able to protect their privacy with the aid of electric gates, tall fences, security booths, remote cameras, motion sensors and roving patrols, but the vast majority of the 60 million people living in the Ninth Circuit will see their privacy materially diminished by the panel’s ruling. Open driveways, unenclosed porches, basement doors left unlocked, back doors left ajar, yard gates left unlatched, garage doors that don’t quite close, ladders propped up under an open window will all be considered invitations for police to sneak in on the theory that a neighborhood child might, in which case, the homeowner “would have no grounds to complain.”¹³⁹

This rationale suggests that in instances of searches utilizing technology, courts will find poor individuals with uncovered driveways, faulty locks or no fences have no reasonable expectation of privacy—even when those things are within the curtilage of their home.

This conclusion aggravates the other areas in which the poor already receive less Fourth Amendment protection. As Slobogin critiqued, the Court’s emphasis on “the existence of ‘effective’ barriers to intrusion” as dictating whether Fourth Amendment protection applies results in “one’s constitutional privacy [being] limited by one’s actual privacy.”¹⁴⁰ The effects foreseen by Judge Kozinski are a clear illustration of the extent to which the Court’s classist framework for Fourth Amendment analysis may affect the poor. If Courts continue to hold that the heightened privacy protections granted to curtilage hang not on a presumption of a reasonable expectation of privacy but on a showing of “actual privacy,” the “constitutional privacy” of the poor will suffer. As Judge Kozinski noted, since the poor do not have the same resources as the wealthy to erect “barriers to intrusion,” the heightened Fourth Amendment protections of their curtilage will vanish.

137. *United States v. Pineda-Moreno*, 591 F.3d 1212, 1215 (9th Cir. 2010) (original opinion).

138. *Pineda-Moreno*, 617 F.3d 1120 at 1121 (rehearing denied en banc) (Kozinski, J., dissenting).

139. *Id.* at 1123 (quoting *United States v. Hedrick*, 922 F.2d 396, 400, 402 (7th Cir. 1991) (Cudahy, J., dissenting)).

140. Slobogin, *supra* note 111, at 401.

Similarly, the Court's failure to legally equate curtilage with the home is poised to expand the discriminatory holding of *Wyman v. James*.¹⁴¹ The Court has already delivered what could be the biggest blow to poor subjects of searches by declaring warrantless searches of welfare recipients' homes constitutional.¹⁴² However, the consequences of this decision would become worse if the Court ceases to equate curtilage with the home. Little would stop the Court from deeming searches of curtilage constitutional for recipients of other federal or state aid, since curtilage no longer holds the heightened privacy protections it once did.

This trend further has potential to aggravate the existing urban/rural divide. The urban poor are already in a vulnerable position when it comes to Fourth Amendment protection of curtilage. The Court has displayed a reluctance to apply the *Dunn* factors¹⁴³ equally in poor urban settings compared to wealthier suburban settings, resulting in the deprivation of curtilage protections for residents of urban multi-occupant dwellings completely.¹⁴⁴ This is despite the fact the urban poor use areas of multi-occupant dwellings in the same manner suburban residents use their own yards. "Occupants of urban, multi-unit dwellings do participate in intimate activities associated with the privacy of a home that extend beyond the doors of their apartments into the common property of the building, such as barbequing on a back patio or sunbathing on a roof deck."¹⁴⁵ "Thus, one who lives in an apartment also treats the area immediately outside his or her apartment home as his or her curtilage."¹⁴⁶

Any hope of the Court creating a curtilage doctrine to fit the lifestyle of the urban poor will be lost if the Court continues the trend of denying curtilage the heightened privacy presumptions it once enjoyed. Where one may argue that curtilage exists in multi-occupant buildings if curtilage is defined as "the area to which extends the intimate activities of the home," it would be substantially more

141. *Wyman v. James*, 400 U.S. 309 (1971).

142. *Id.*

143. *United States v. Dunn*, 480 U.S. 294, 301 (1987).

144. *Stoner v. California*, 376 U.S. 483 (1964); *Miller v. United States*, 357 U.S. 301, 314 (1958).

145. Leonetti, *supra* note 54, at 318.

146. *Robertson v. State*, 740 N.E.2d 574, 576 (Ind. Ct. App. 2000), *vacated on other grounds*, 765 N.E.2d 138 (Ind. 2002) (holding that curtilage doctrine is not implicated in case at bar).

difficult to argue for the existence of curtilage if it is instead defined by whether or not there are “effective barriers to intrusion.”

Lastly, the Court’s trend also stands to aggravate the absence of Fourth Amendment protection the poor face from overenforcement. As Judge Kozinski noted, “[o]pen driveways, unenclosed porches, basement doors left unlocked, back doors left ajar, yard gates left unlatched, garage doors that don’t quite close . . . will all be considered invitations for police to sneak in.”¹⁴⁷ And why not? Under the theory of curtilage presented by the Ninth Circuit, an intrusion of a suspect’s curtilage conducted by police using some kind of technological enhancement would not violate the Fourth Amendment. Police who are already hyper vigilant in poor neighborhoods may take advantage of these “invitations,” and subject the poor not only to a lack of Fourth Amendment protection on the street but also in their own homes and curtilage.

Thus, the Court’s trend of failing to apply heightened Fourth Amendment protections to curtilage has several classist repercussions. It not only reinforces the Court’s classist framework of Fourth Amendment analysis, creating a heavier reliance on actual privacy to determine constitutional privacy, but also worsens the holding of *Wyman*, the existing urban/rural divide, and the phenomenon of police overenforcement of poor areas. Severing curtilage from its legal equal opens the opportunity for “[o]pen driveways, unenclosed porches, basement doors left unlocked, back doors left ajar, yard gates left unlatched, garage doors that don’t quite close”¹⁴⁸ to become avenues to decrease the considerably diminished Fourth Amendment protections the poor have.

IV. Proposed Solutions

If courts continue to refuse to give curtilage the same heightened Fourth Amendment protection as the home, the poor will continue to be a “subconstitutional class.”¹⁴⁹ Thus, something must be done to ensure “poor people are entitled to privacy, even if they can’t afford all the gadgets of the wealthy for ensuring it.”¹⁵⁰ However, the solution here depends on how the problem is defined.

147. *Pineda-Moreno*, 617 F.3d 1120 at 1123 (rehearing denied en banc) (Kozinski, J., dissenting).

148. *Id.*

149. Budd, *supra* note 118, at 357.

150. *Pineda-Moreno*, 617 F.3d 1120 at 1123 (rehearing denied en banc) (Kozinski, J., dissenting).

This problem may be defined as a purely legal one. The source may either be a lack of adherence to *stare decisis*, or the use of a fallible legal framework. Perhaps the Court has simply deviated from precedent affording curtilage heightened Fourth Amendment protection. Alternatively, the Court may be using an inherently classist framework for Fourth Amendment analysis as Slobogin suggests.

On the other hand, the problem may be defined as a social one. Perhaps the Court has strayed from precedent or utilized a classist legal framework because of underlying social attitudes toward the poor. Whether the problem is legal or social, the solution addressing it should be of kind.

A. Legal Solution

The Court's trend of failing to recognize heightened Fourth Amendment protections of curtilage in circumstances involving technology-enhanced searches may be solely due to a deviation from precedent. This would certainly not be the first time the Court strayed from previously announced rules; after all, the Fourth Amendment itself was originally formulated to protect against physical invasion.¹⁵¹

Alternatively, this aggravation of the Poverty Exception could be a product of the legal framework the Court uses to analyze Fourth Amendment issues. As Slobogin notes, the Court seems to use an inherently classist framework.¹⁵² The Court could be "defin[ing] expectations of privacy in a way that makes people who are less well-off more likely to experience" a decrease in Fourth Amendment protections.¹⁵³ In either case, the solution must involve some means of demonstrating to the Court the flaws in its legal logic and provide suggestions for correcting it.

While this is an arduous task to say the least, amicus briefs could be a useful tool. One study found that Supreme Court Justices find amicus briefs that "focus the court's attention on matters that impact a direct interest that is likely to be materially impacted by the case" to

151. *Olmstead v. United States*, 277 U.S. 438, 464–66 (1928); Renee McDonald Hutchins, *Tied Up in Knots? GPS Technology and the Fourth Amendment*, 55 UCLA L. REV. 409, 425 (2007).

152. Slobogin, *supra* note 111, at 400.

153. *Id.*

be “moderately to very helpful.”¹⁵⁴ Of circuit court respondents to the same study, 73.7% echoed the Supreme Court’s sentiment, as did 72.7% of district court judges.¹⁵⁵ However, there is “much less support for amici who focused the court’s attention on their own ideological interests.”¹⁵⁶ Instead, “in learning about the potential impact of their decisions, [judges] seek to hear this information from an affected group whose direct interests may be materially impacted rather than from groups or individuals with an ideological interest that they wish to share.”¹⁵⁷

Thus, to be effective, these amicus briefs must be written from the perspective of the group that stands to be materially impacted by the issue at hand: the poor. However, this must be done in a way that avoids coming across as simply drawing the court’s attention to the poor’s own ideological interests. The next time the Court grants certiorari on a Fourth Amendment search case that involved a search utilizing technology or has other implications for poor individuals, a legal advocacy group could submit an amicus brief to the court utilizing concrete examples of how the poor are “materially impacted” by this jurisprudential trend. Additionally, the brief could outline for the court the traditional heightened Fourth Amendment protection given curtilage, and urge the Court to once again adhere to that precedent.

Of course, there is a risk that even this will border on drawing the Court’s attention to ideological interests. The authors of these briefs must tread lightly, and utilize as many examples of the poor being materially impacted by this aggravation of the poverty exception as possible.

B. Social Solution

Of course, this aggravation of the Poverty Exception may not be of legal origin at all. It may be a product of our own social structure and of latent social conceptions of the poor held by judges. If that is the case, it will take more than legal arguments to fix the discrepancy in Fourth Amendment protection caused by this diminishing protection of curtilage.

154. Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 692 (2008).

155. *Id.*

156. *Id.* at 693

157. *Id.*

Judge Kozinski offers a solution to this social problem in his dissent to the Ninth Circuit's denial of Pineda-Moreno's en banc rehearing. Claiming the economic disparity in Fourth Amendment protection stems from a lack of economic diversity on the bench, Judge Kozinski stated, "[n]o truly poor people are appointed as federal judges, or as state judges for that matter."¹⁵⁸ Judges are not selected from the class of people who "live in trailers or urban ghettos. . . . The everyday problems of people who live in poverty are not close to our hearts and minds because that's not how we and our friends live."¹⁵⁹ The obvious solution to this problem is to appoint individuals to the bench who themselves have had personal experiences with poverty.

However, the most basic of requirements for becoming a judge place barriers to entry in the way of the poor that are not easily overcome. From a practical standpoint, any individual seeking judicial appointment or election requires a Juris Doctor degree.¹⁶⁰ Yet, there are many barriers to getting a J.D. that make it extremely difficult for people in poverty to obtain. To get a J.D., a prospective attorney needs to attend law school. Law school is expensive; a legal education can cost \$150,000.¹⁶¹ Additionally, in order to go to law school, said prospective attorney must attend college. College, while cheaper than law school, is not free. A college education can cost anywhere from \$5,000 a year to \$50,000 a year.¹⁶² Loans, of course, are an option to finance both college and law school. However, loans must be paid back, and with interest.¹⁶³ Given the financial barriers to achieving this necessary element of becoming a judge, the numbers of those in poverty who can achieve it are low.

158. *Pineda-Moreno*, 617 F.3d 1120 at 1123 (rehearing denied en banc) (Kozinski, J., dissenting).

159. *Id.*

160. The following does not include the additional requirements of being appointed or elected to a judicial position, which themselves take significant time, money, and connections.

161. *Paying for Law School*, U.S. NEWS AND WORLD REPORT, <http://www.usnews.com/education/best-graduate-schools/top-law-schools/paying> (last visited March 3, 2011).

162. *Colleges*, U.S. NEWS AND WORLD REPORT, <http://colleges.usnews.rankingsandreviews.com/best-colleges/search.result> (last visited March 3, 2011).

163. *Direct Stafford Loans*, FEDERAL STUDENT AID, <http://studentaid.ed.gov/PORTALSWebApp/students/english/studentloans.jsp> (last updated June 29, 2010). One of the most common federal loans, the Direct Stafford Loan, currently has a 4.5% fixed interest rate for undergraduate students, and a 6.8% fixed interest rate for graduate and professional school students. *Id.*

A more practical solution than Judge Kozinski's suggestion may be to familiarize current and future judges with the "everyday problems of people who live in poverty." In many states, newly appointed or elected judges are required to participate in some "training and education programs to assist new judges in their unfamiliar role on the bench."¹⁶⁴ This program "can be several weeks long and cover topics ranging from caseload management to substantive law to judicial canons to hiring and employment practices."¹⁶⁵ In some states, such as California, policy issues are expressly covered.¹⁶⁶ Part of the policy module of these programs could be dedicated to discussing the unique legal plights of the poor. Judges could be trained to spot jurisprudential bias in the application of Fourth Amendment issues. The program could focus on the traditional heightened Fourth Amendment protection the curtilage receives, and encourage judges to strive to apply the Fourth Amendment the same way regardless of the economic strata of the defendant in front of them.

Once judges are instructed on those issues, they could also be instructed on the inequities in urban planning that contribute to the poor's "everyday problems" as well as discrepancy in Fourth Amendment protection. While physical space is there for the taking in suburban and rural settings, the same is not true for the city. "The economic development planner sees the city as a location where production, consumption, distribution, and innovation take place. . . . Space is the economic space of highways, market areas, and commuter zones."¹⁶⁷ This, naturally, leads to competition over space and "competing claims on and uses of property."¹⁶⁸ The resulting limited space alters the way people in urban areas use that space. Large yard and land attached to the dwelling is unavailable in urban areas. Thus, as noted before, "[o]ccupants of urban, multi-unit dwellings do participate in intimate activities associated with the privacy of a home that extend beyond the doors of their apartments

164. Noreen Sharp, *Judicial Formation: A Step Beyond Education or Training for New Judges*, 29 JUSTICE SYS. J. 100, 100 (2008); see Cal. Rules of Court, Rule 10.462(c).

165. Sharp, *supra* note 164, at 100.

166. California's program, the New Judge Orientation ("NJO") consists of three modules: "Assuming the Bench, Running the Courtroom, and Policy Considerations." *New Judge Orientation Brief*, SUPERIOR COURT, http://courts.ca.gov/documents/KlepsBrief_NJO.pdf. (last visited September 20, 2011).

167. Scott Campbell, *Green Cities, Growing Cities, Just Cities? Urban Planning and the Contradictions of Sustainable Development*, J. OF THE AM. PLAN. ASS'N, Summer 1996.

168. *Id.*

into the common property of the building, such as barbecuing on a back patio or sunbathing on a roof deck.”¹⁶⁹ “Thus, one who lives in an apartment also treats the area immediately outside his or her apartment home as his or her curtilage.”¹⁷⁰ If, through training programs, judges were exposed to this fact it would be considerably harder for them to find that the curtilage concept and its associated protections are for suburban and rural areas only.

While surely this would not be a perfect solution, familiarizing judges with the legal issues facing those in poverty as well as inequities in urban planning could help minimize the disparity in Fourth Amendment protections afforded to them.

Conclusion

The use of technology in searches of curtilage has eroded the modern curtilage doctrine. Rather than holding that curtilage is afforded the same heightened Fourth Amendment protections against unreasonable search as the home, as has previously been the case, the Court has found the presence of technology in a search of curtilage as a reason to distinguish curtilage from its historical legal equal.

This jurisprudential trend has caused significant aggravation of the Poverty Exception to the Fourth Amendment. While the poor face inequitable treatment under the Fourth Amendment and criminal justice system in general, the lack of protection afforded curtilage in searches utilizing technological advancement make it worse. It enforces the Court’s classist framework for Fourth Amendment analysis, renders the already present urban/rural divide more difficult to repair, and opens the door for further police abuse of the poor.

Despite this dismal picture, some solutions are available to restore the curtilage doctrine. From a legal perspective, groups can use amicus briefs to illustrate how the poor are materially impacted by this decrease in Fourth Amendment protection. From a social perspective, policy modules can be added to new judge orientations focusing on the unique legal plight facing the poor in issues of technologically enhanced searches of curtilage. Judges could also be

169. Leonetti, *supra* note 54, at 318.

170. Robertson v. State, 740 N.E.2d 574, 576 (Ind. Ct. App. 2000), *vacated on other grounds*, 765 N.E.2d 138 (Ind. 2002) (holding curtilage doctrine not implicated in case at bar).

educated on the inequalities in urban planning that lead poor residents of urban, multi-occupant buildings to use currently unprotected portions of their building in the same way suburban residents use their front and back yards. Through these solutions the curtilage doctrine can once again serve as an extension of the heightened Fourth Amendment protections afforded to the home in recognition of the fact that the Fourth Amendment applies to all people, regardless of income.